United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

78-2114

To be argued by
BARRY R. FERTEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIGINALD ROBERTSON,

Plaintiff-Appellant,

-againt-

PAUL J. REGAN, Chairman, New York Board of Parole,

Defendant-Appellee.

BRIEF FOR APPELLEE

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Defendant-Appellee.	:	

BRIEF FOR APPELLEE

Statement

This is an appeal by plaintiff-appellant (hereinafter "plaintiff") from an order of the United States District Court for the Southern District of New York (Knapp, J.), dated April 19, 1976, granting defendant-appellee's (hereinafter "defendant") motion to dismiss the complaint.

On February 15, 1977, this Court granted plaintiff's motion for the assignment of counsel on appeal.

Questions Presented

1. Has plaintiff's complaint been rendered moot insofar as he was provided with a parole release hearing?

2. Did the District Court properly dismiss plaintiff's complaint for failure to allege a deprivation of a constitutional right?

3. Should the case be remanded to the District Court with the direction that counsel be appointed notwithstanding the lack of dispute as to the facts of this case?

Facts

Plaintiff, appearing pro se in the District Court, alleged in his complaint, that defendant's failure to provide plaintiff a timely parole release hearing constituted a violation of his right to procedural due process. (Complaint at page 8, ¶ 2). Plaintiff further alleged that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (Complaint at page 7, ¶ 1).

Plaintiff, having purportedly brought this action pursuant to 42 U.S.C. § 1983, sought a preliminary injunction, compensatory and punitive damages, and the assignment of counsel. (Complaint at p. 9).

On April 15, 1961, plaintiff was sentenced by the Supreme Court, Kings County (Starkey, J.) to fifteen to thirty years for second degree robbery, second degree grand larceny, and second degree assault, and five to twenty years for third degree robbery; all sentences to run concurrently. (Decision of District Court at page 2). On December 21, 1970, plaintiff was paroled from Clinton Correctional Facility.*

Subsequently, on August 20, 1971, plaintiff was arrested for the crime of first degree murder. Based upon the arrest, he was declared delinquent on October 21, 1971. Plaintiff was convicted by a jury of first degree manslaughter, and on August 31, 1972, he was sentenced in the Supreme Court, Kings County (Starkey, J.) to an indeterminate sentence with a maximum of twenty years. (Plaintiff's reply affidavit at page 2).

* Plaintiff properly points out in his brief the District Court's error as to the date of Robertson's release on parole. (Appellant's brief at p. 8). Appellant failed to mention that plaintiff also adopted the incorrect date of parole in his statement of facts in reply to defendant's motion to dismiss. (R. 6, page 2). The "mistake" was therefore an undisputed fact which was incorporated by the court in its decision. That this mistake was unnoticed by counsel and the court reveals its insignificance.

This later sentence was to run concurrently with the unexpired sentence rendered in 1961. Plaintiff was thereafter committed to a state correctional facility on September 19, 1972, and on July 18, 1973, the New York State Board of Parole held a hearing and set plaintiff's minimum sentence at three years from the date of his reception at that facility (District Court decision at p. 2).

The Board was apparently under the mistaken belief that the minimum sentence would expire in August, 1975, at which time plaintiff would be eligible for parole. (District Court decision at p. 2). Since all of plaintiff's sentences were to run concurrently, he was entitled to ten years credit for time served under the 1961 sentence; this ten years credit would have more than satisfied his three year minimum term from the 1972 conviction. New York Penal Law § 70.30(1)(a). He was, therefore, eligible for parole in July, 1973, the date when the Board imposed the minimum term.

Counsel for the Board discovered this fact, and advised the Board that plaintiff was immediately eligible for parole. (District Court decision at 2). In accordance with this advice, the Board belatedly held its first parole release hearing on January 29, 1975, whereupon a decision was postponed until

August 26, 1975, the date originally intended by the Board to be plaintiff's first date of parole eligibility. (District Court decision at 3). A hearing was held in August, and parole was denied based upon plaintiff's past failures on parole, viz., while on parole he committed the crime of first degree manslaughter (minutes of hearing at page 5, Reasons for Denial of Parole). New York Correction Law §§ 213, 214.

Procedural History

Appellant's brief erroneously states that plaintiff brought this action after his January, 1975 hearing. The complaint itself was signed by plaintiff on January 10, 1975 (complaint at page 9), almost three weeks prior to the scheduled date of his January hearing.* On January 31, 1975, the District Court, granted plaintiff's application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a) (Edelstein, Ch.J.). It was after plaintiff was granted in forma pauperis status that the

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* Moreover, plaintiff's motions for injunctive relief, and permission to proceed in forma pauperis as well as his attestation of proof of service were all signed by plaintiff on January 10, 1975.

complaint was filed with the Clerk. Finally, defendant was not served with the complaint until the latter part of February, almost a month after the January hearing was held.

The District Court was therefore correct in stating that this lawsuit was apparently prompted by the plaintiff's receipt of notice of his hearing early in January, 1975. (District Court decision at 3).

Defendant's motion to dismiss the complaint was withdrawn pending the outcome of plaintiff's August, 1975, hearing. Subsequent to that hearing and the Board's unfavorable determination, the motion was renewed on December 5, 1976, and granted by the District Court on April 19, 1976.

The District Court of the Southern District of New York (Knapp, J.) held that the Board did not violate any of plaintiff's constitutional rights when it failed to hold a parole release hearing at the statutorily mandated time.

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM.

A. Plaintiff's Complaint has been rendered moot.

Defendant concedes that plaintiff was not afforded his parole release hearing when plaintiff became statutorily eligible for parole under Penal Law § 70.40(1)(a). Instead of providing a hearing when plaintiff's minimum sentence was fixed in August, 1973*, the Board scheduled his first parole release hearing for August, 1975.

Plaintiff claimed that this delay resulted in mental anguish (Complaint at p. 3, Second Cause of Action, ¶ I), notwithstanding his longstanding belief during this period that the Parole Board acted properly in scheduling his parole release hearing two years after his appearance before it. (Complaint at p. 7, ¶ 2). Plaintiff therefore sought damages not because of any mental anguish, for he was unaware of his right to an earlier

* The one year period between the Board's imposition of a minimum sentence (August, 1973) and plaintiff's arrival at the state institution (August, 1972) is required by Correction Law § 212(2) which mandates a minimum period of nine months between incarceration and the fixation of the minimum sentence by the Board.

hearing, but as an opportunity to obtain a windfall verdict against the Parole Board for a violation of his rights of which he was never aware.*

In Carey v. Piphus, 435 U.S. 247 (March 21, 1978), the Supreme Court held that absent actual proof of compensable injuries, one is not entitled to compensatory damages based upon an alleged deprivation of procedural due process. The court reasoned that in a case where the defendants' determination was proper, albeit without a hearing, an award of damages for injuries caused by that decision "would constitute a windfall, rather than compensation." 435 U.S. at 260.

Similarly, in the present case, the Board did afford plaintiff his hearing, and the resulting decision complied with the applicable statutory and constitutional standards. New York Correction Law § 214, United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F. 2d 925 (2d Cir.), vacated and remanded as moot, sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974). It thus follows that absent any allegation that plaintiff was aware of his entitlement to the hearing throughout the delay, that he notified the Board of their failure to timely

* The District Court viewed the lawsuit as having been prompted by the Board's initiation of the belated hearing. (Decision at p. 3).

provided him with a hearing, and that they refused to comply with his request, he is not entitled to damages. Carey v. Piphus, supra, 435 U.S. at 264.*

Plaintiff was therefore entitled to, and did in fact receive the parole release hearing to which he was entitled under Correction Law § 214. He was then denied parole because of his commission of first degree manslaughter while under parole supervision. Plaintiff was afforded his parole hearing, provided ample reasons for the Board's denial of his parole, and can therefore no longer complain of his denial of a hearing. In sum, he received all the relief to which he was legally entitled. Golden v. Zwickler, 394 U.S. 103, 110 (1969); Preiser v. Newkirk, 422 U.S. 395 (1975); Lecci v. Cahn, 493 F. 2d 826, 828, (2d Cir., 1974); Fitzgerald v. Procunier, 410 F. Supp. 1186, 1189 (N.D. Cal., 1976); Nelson v. Sugarman, 361 F. Supp. 1132, 1141 (S.D. N.Y., 1972).**

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* Cf. United States ex rel. Schuster v. Vincent, 524 F. 2d 153 (2d Cir., 1975), where this Court found a three year delay in providing a prisoner with a sanity hearing to be egregious, but apparently not a basis for damages.

** In his brief, plaintiff claims that he was entitled to an explanation by the Board as to the basis for its delay in providing a hearing so as to avoid any appearance of impropriety (appellant's brief at p. 16). This view presupposes that the Board acted in retaliation for the lawsuit, which cannot be the case as the Board was served with the complaint after its January hearing. On the contrary, one can infer that the Board initiated the hearing in order to provide plaintiff, albeit belatedly, with his release hearing.

B. The Complaint Failed to State a Federal Claim.

Plaintiff complained of a delay in affording him a parole release hearing. The courts have consistently held that a prisoner's due process right in parole release is far outweighed by a parolee's due process interest in parole revocation. United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra, 500 F. 2d 925, 928. Accord Haymes v. Regan, 525 F. 2d 540 (2d Cir., 1975); Holup v. Gates, 544 F. 2d 82, n. 1 at 85 (2d Cir., 1976).

Accordingly, a prisoner seeking parole is not entitled to counsel at his parole release hearing (Johnson, supra, 500 F. 2d at 928; Briguglio v. New York State Board of Parole, 24 N Y 2d 21 (1969), as has been required by the Supreme Court in parole revocation hearings. Morrissey v. Brewer, 408 U.S. 471 (1972).

Moreover, it is axiomatic that upon becoming eligible for parole, a prisoner does not have a constitutional right to his release. Haymes v. Regan, supra, 525 F. 2d at 543; Tomarkin v. Bombard, 56 A D 2d 881 (2d Dept., 1977).

All that is constitutionally required is a statement of reasons for the denial of parole and the essential facts upon

which that determination was based. Johnson, supra, 500 F. 2d at 934. In the present case, plaintiff was given sufficient reasons for the Board's denial of parole, viz, his commission of manslaughter in the first degree while under parole supervision.

Assuming that (arguendo) plaintiff could demonstrate that he was prejudiced by the delay in and of itself, he may have stated a claim; plaintiff was required to allege that the delay in a release hearing prejudiced the Board when it rendered its eventual decision denying parole. Kartman v. Parratt, 535 F. 2d 450 (8th Cir., 1976), see also Coralluzzo v. New York State Board of Parole, 566 F. 2d 375, 380 (2d Cir., 1977), appeal dismissed, 98 S. Ct. 1464; United States ex rel. Sims v. Sielaf, 563 F. 2d 821, 828 (7th Cir., 1977); Redding v. Vermillion, 416 F. Supp. 1181 (W.D. Mo. 1976).

Plaintiff cannot, however, allege any prejudice resulting from the delay in his hearing. The Board's decision would not have been any different had it been rendered when plaintiff became eligible for parole as the same justification for its denial of parole also existed at that time (District Court decision at p. 4).

Had the Board's belated denial been based upon plaintiff's conduct in prison during the delay, and if that conduct was prompted by the Board's failure to timely review plaintiff's case, then such prejudice may have existed. See United States ex rel. Schuster v. Vincent, supra. Such a set of factual circumstances is not presented herein.

Accordingly, the District Court properly dismissed the complaint.

POINT II

REMAND TO THE DISTRICT COURT WITH THE APPOINTMENT OF COUNSEL IS UNNECESSARY IN LIGHT OF THE COMPLAINT'S LACK OF MERIT.

Appellant's counsel on appeal urges this Court to remand the case with the directive that counsel be assigned so that the record may be more fully developed. (Appellant's brief at pp. 16-19). In support of this contention it is argued that plaintiff, having appeared pro se, was unable to develop a claim that may have in fact existed.

For the reasons stated in Point I, supra, even under a most charitable reading of plaintiff's complaint, it fails to state a claim. Haines v. Kerner, 404 U.S. 519 (1972).

Furthermore, contrary to what appellant suggests, it is well settled that there exists no constitutional requirement that there be appointment of counsel for litigants in civil cases. Securities and Exchange Commission v. Alan F. Hughes, Inc., 481 F. 2d 401, 403 (2d Cir., 1973) cert. denied 414 U.S. 1092. And the courts have repeatedly held that a prisoner does not have a constitutional right to the assistance of counsel in the prosecution of a civil rights lawsuit under 42 U.S.C. § 1983. Saylor v. United States Board of Parole, 345 F. 2d 100, 103 (D.C. Cir., 1965); Bethea v. Crouse, 417 F. 2d 504, 505 (10th Cir., 1969); Hartwick v. Ault, 517 F. 2d 295, 298 (5th Cir., 1975); Campbell v. Patterson, 377 F. Supp. 71, 73 (S.D.N.Y., 1974); Sanno v. Preiser, 397 F. Supp. 560 (S.D.N.Y., 1975).*

In the present case, there are no disputed facts. The only question presented is whether the Board's delay in affording plaintiff his parole release hearing entitled plaintiff to the relief he requested. Such a question is purely a matter of law, and the appointment of counsel is unnecessary. Desmond v. United States Board of Parole, 397 F. 2d 386, 391 (1st Cir., 1968), cert. denied 393 U.S. 919.

* In Bounds v. Smith, 430 U.S. 817 (1977), the Supreme Court declined to adopt a rule requiring the appointment of counsel for state prisoners who institute civil rights actions.

Furthermore, the appointment of counsel pursuant to 28 U.S.C. § 1915(d)* is discretionary. Purcell v. Johnston, 307 F. Supp. 1360 (S.D.N.Y., 1970). And where, as here, the complaint is without merit, the courts have declined to appoint counsel. Miller v. Pleasure, 296 F. 2d 283 (2d Cir., 1961), cert. denied 370 U.S. 964 (1962).**

Accordingly, the District Court properly declined to appoint counsel for plaintiff.***

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* Appellant is apparently under the misconception that the statute which authorizes appointment of counsel in this case is 18 U.S.C. § 3006A (appellant's brief at p.19), but that statute applies to criminal cases only.

** Although plaintiff was permitted to proceed in forma pauperis, this determination is not dispositive of this issue. Miller v. Pleasure, supra, at 284; Purcell v. Johnston, supra.

*** Finally, remand of this case would be unnecessary as the District Court's decision clearly states the relevant facts and the law with respect to plaintiff's claim Carter v. Stanton, 405 U.S. 669, 671 (1972).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
October 10, 1978

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARILYN LISI , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for defendant-appellee herein. On the 10th day of October , 197 8 , s he served the annexed upon the following named person :

Wellington A. Newcomb, Esq.
36 West 44th Street
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Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Marilyn Lisi

Sworn to before me this
10th day of October , 197 8

Barry R. Flutoff
Assistant Attorney General
of the State of New York